

DECLARATION OF CHRISTOPHER V. GOODPASTOR

1. My name is Christopher V. Goodpastor. I am over 18 years of age and am competent to make this declaration. The statements in this declaration are true and correct.

2. I presently serve as Regional Counsel for Covad Communications Company. As Regional Counsel, I am responsible for legal and regulatory matters involving Covad in Texas, including negotiating interconnection agreements with incumbent local exchange carriers and representing Covad in regulatory proceedings. In particular, I am one of the attorneys responsible for representing Covad in its negotiation of an interconnection agreement with SWBT in Texas and in the interconnection agreement arbitration between Covad and SWBT before the Public Utility Commission of Texas.

Summary

3. My declaration provides the following information:
- A summary of SWBT's efforts to delay Covad's entry in Texas by negotiating in bad-faith and insisting upon contractual provisions that are contrary to federal law and regulation;
 - A description of SWBT's further efforts to delay Covad's entry in Texas by abusing the discovery process in the interconnection agreement arbitration in Texas ("DSL Arbitration") and by instructing 81 SBC employees to destroy evidence relevant to the DSL Arbitration *after* requests for discovery had been issued;
 - An explanation of the relationship between the implementation of the DSL Arbitration Award and the commitments made by SWBT to the Texas Commission in the 271 Collaborative Project;
 - A summary of SWBT's refusal to articulate the full terms and conditions of its interconnection agreement with its so-called "separate affiliate," Advanced Services, Inc. ("ASI") as required by the SBC-Ameritech Merger Conditions, preventing DSL CLECs from "opting in" to the agreement;

- A description of SWBT's use of its discriminatory Selective Feeder Separation (SFS) scheme to prevent CLEC's SDSL services from competing with SWBT's T-1 services and to favor deployment of SWBT's ADSL services over the DSL services of other CLECs.

Summary of Covad's Efforts to Provide DSL Services in Texas

4. The following paragraph provides a timeline of Covad's efforts to provide Texas consumers with DSL services:

- **May 1998:** Covad requests a interconnection agreement with SWBT for Texas; negotiations are fruitless;
- **December 1998:** Covad files for arbitration in Texas and serves discovery requests;
- **January 1999:** SBC attorney orders 81 employees of SBC, SWBT, and Pacific Bell to destroy evidence relevant to the DSL Arbitration;
- **April 14, 1999:** Original DSL Arbitration hearing; Covad and Rhythms uncover substantial and pervasive discovery abuses by SWBT;
- **April-June 1999:** Arbitrators allow additional discovery in the DSL Arbitration;
- **April 26, 1999:** Arbitrators order SWBT to execute an Interim Interconnection Agreement with Covad and Rhythms to prevent further delay of market entry;
- **May 11, 1999:** SWBT appeals the Interim Order to the Texas Commission, ultimately settling the appeal just days before the Texas Commission's hearing;
- **June 1999:** Covad and SWBT execute an Interim Agreement pursuant to settlement of SWBT's appeal of Interim Order;
- **June 2 - 5 1999:** Second DSL Arbitration hearing;
- **July 1999:** Arbitrators sanction SWBT for discovery abuse in DSL Arbitration; Texas Commission eventually fines SWBT \$850,000;
- **July 15, 1999:** Telcordia concludes its OSS testing for DSL;
- **August 2, 1999:** Covad launches services in Dallas, Ft. Worth, Houston and Austin;
- **November 1999:** FCC Orders SBC to dismantle its discriminatory SFS loop qualification scheme in the *Third Advanced Wireline Services Order*;
- **November 30, 1999:** Arbitrators issue Arbitration Award, finding for Covad and Rhythms on all significant issues;

- **January 6, 2000:** SWBT appeals Arbitration Award;
- **January 27, 2000:** Texas Commission affirms DSL Arbitration Award on all significant issues;
- **February 7, 2000:** Covad's Interconnection Agreement with SWBT finally becomes effective.

**SWBT Delayed Covad's Entry Into Texas
by Negotiating in Bad Faith**

5. In May 1998, Covad requested an agreement with SWBT for interconnection, services, and network elements in Texas. Because Covad had an existing interconnection agreement with SWBT's sister company, Pacific Bell (like SWBT, a wholly-owned subsidiary of SBC), Covad suggested using this agreement as a template for negotiations with SWBT. SWBT, however, refused this offer, claiming that Covad's agreement with Pacific Bell was executed with "an entirely different company."

6. Covad sought to provide xDSL services in Texas, including ADSL (asynchronous digital subscriber line), SDSL (synchronous digital subscriber line), and IDSL (ISDN digital subscriber line), using unbundled network elements leased from SWBT. At that time, Covad had successfully provisioned all of these services using UNEs leased from Pacific Bell, SWBT's sister company. SWBT, however, claimed that only an ADSL UNE was available in Texas. According to SWBT, if Covad desired to provide anything other than ADSL (which is the only DSL service provided by SWBT's retail division), Covad would be required to endure SWBT's lengthy bona fide request ("BFR") process, involving unnecessary and time-consuming testing, data collection, and analysis to be performed at SWBT's convenience. According to SWBT correspondence, SWBT would not "permit such a 'free for all' where Covad and every other carrier would be allowed to place as much power and at whatever frequencies they desire whenever and

as for long as they desire.” A true and correct copy of this correspondence is attached hereto as Exhibit CG-1.

7. SWBT’s position was both disingenuous and contrary to federal regulations. ADSL and SDSL require the same type of UNE, *i.e.*, a standard copper POTS loop that is free of intervening equipment such as load coils, excessive bridged tap, and repeaters. By providing a UNE capable of supporting ADSL, SWBT, by definition, provided a UNE capable of supporting SDSL. SWBT simply refused to allow Covad to use that UNE to provide a competitive service.

8. SWBT’s alleged concerns regarding network harm also were false. Covad successfully had provisioned SDSL over the network of SWBT’s sister company, Pacific Bell, without network harm. Moreover, SWBT’s retail T-1 services (which provide synchronous bandwidth of 1.5 Mbps) and similar services, such as frame relay, compete with CLEC deployment of SDSL technology (which provides synchronous bandwidth of up to 1.1 Mbps).

9. SWBT’s transparent position also violated regulations promulgated by this Commission. Under 47 C.F.R. § 51.309(a),

[a]n incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting carrier intends.

By refusing to allow to provide SDSL over existing UNE offerings, SWBT plainly sought to limit the use of unbundled network elements in a manner that impaired Covad’s ability “to offer a telecommunications service in the manner [Covad] intend[ed].”

10. SWBT also insisted upon other untenable positions in negotiations, including:

- Retaining the right to unilaterally modify the Interconnection Agreement by requiring the Agreement to incorporate SWBT's Technical Publications, and allowing SWBT to modify those publications at its sole discretion;
- Retaining the right to unilaterally control spectrum management policies, such as Selective Feeder Separation;
- Retaining the right to place "Spectral Detector Coils" on all of Covad's lines to monitor the types of services Covad provides;
- Refusing to provide a uniform rate for loop conditioning;
- Refusing to commit to a date certain for mechanizing its outdated OSS systems.

11. SWBT also unnecessarily delayed negotiations by (1) by refusing disclose cost studies in a manner that allowed any rigorous analysis of SWBT's pricing, requiring Covad to review cost studies at SWBT's premises without the benefit of photocopying (Exhibit CG-1, Attach. A at 14.), and (2) refusing to provide copies of its Technical Publications (which it sought to incorporate into the Agreement) directly to Covad, requiring Covad to endure the delay of ordering such publications through SBC's corporate headquarters in San Antonio. (Exhibit CG-1, Attach. A at 6.)

12. Both of these tactics violate the "good-faith" negotiations standards promulgated by this Commission. Under FCC Order 96-325,

[A]n incumbent LEC may not deny a requesting carrier's reasonable request for cost data during the negotiation process, because [the Commission] conclude[s] that such information is necessary for the requesting carrier to determine whether the rates offered by the incumbent LEC are reasonable.

(FCC Order 96-325 ¶ 155.) By refusing to allow Covad access to cost studies in a manner that would allow Covad “to determine whether the rates offered by the incumbent LEC are reasonable,” SWBT violated its duty to negotiate in good faith.

13. Under 47 C.F.R. § 51.301(c)(6), a party violates its duty to negotiate in good faith by “[i]ntentionally obstructing or delaying negotiations or resolutions of disputes.” By forcing Covad to endure the time-consuming process of seeking copies of SWBT’s Technical Publications (which clearly were accessible to SWBT’s negotiators) from SBC’s corporate headquarters, SWBT unnecessarily delayed its negotiations with Covad.

14. Given the disappointing pace of negotiations with SWBT, Covad sought an extension of the negotiation period allowed by the Telecommunications Act to avoid the expense and delay associated with an arbitration against SWBT. Unfortunately, this additional negotiation period did not produce the desired results. Consequently, Covad filed for arbitration against SWBT before the Texas Commission on December 21, 1998. Overall, SWBT’s bad-faith negotiation tactics delayed Covad’s ability to offer DSL services to Texas consumers by approximately seven (7) months.

**SWBT Further Delayed Covad’s Entry Into Texas
By Abusing the Discovery Process in the Texas DSL Arbitration**

15. The Texas Commission consolidated Covad’s Petition for Arbitration with a petition filed by Rhythms Links, Inc. (formerly Accelerated Connections, Inc.) on December 11, 1998. Discovery, including requests for production of documents to SWBT, commenced on January 6, 1999. The Arbitrators scheduled the initial hearing for April 14 – 17, 1999.

16. Before the initial hearing, SWBT produced a mere 63 pages of documents to Covad in response to discovery requests. On April 14, 1999, Covad and Rhythms determined that SWBT had not produced documents requested in discovery, including a document entitled "Southwestern Bell DSL Methods and Procedures." Considering the relevance of this document and its responsiveness to outstanding discovery requests by both Covad and Rhythms, Covad and Rhythms filed motions for sanctions. Because of the belated production of highly relevant documents and the concern that SWBT had not responded to discovery requests, the Arbitrators extended the discovery deadline for six weeks to allow Covad and Rhythms to conduct additional discovery. The Arbitrators rescheduled the hearing on the merits for June 2 - 5, 1999. The Arbitrators also scheduled a hearing on the Motions for Sanctions for June 2, 1999. By the end of the additional discovery period, SWBT had produced approximately 13 boxes of documents responsive to Covad's discovery requests, far more than the 63 pages originally produced.

17. During the additional discovery period, Covad and Rhythms discovered a document, subsequently introduced into evidence as ACI Exhibit 153, containing an instruction from an SBC attorney to 81 employees of SBC, SWBT, and Pacific Bell to destroy DSL-related evidence. A true and correct copy of ACI Exhibit 153 is attached hereto as Exhibit CG-2. The document shows that the SBC attorney sent the instruction after discovery requests had been propounded to SWBT in the DSL Arbitration. As a result, Covad and Rhythms amended their Motions for Sanction to include SBC's conduct relating to the destruction of evidence.

18. Following the Arbitrators' decision to extend the discovery period, Covad and Rhythms requested an interim order requiring interconnection to prevent further delay of their entry into Texas. The Arbitrators issued such an order on April 26, 1999. SWBT subsequently appealed the order on May 11, 1999, imposing further delay. Just days before the Commission's hearing of SWBT's appeal, SWBT settled its appeal with Covad and Rhythms. As a result, Covad entered into a limited Interim Agreement with SWBT on June 2, 1999. A true and correct copy of the Interim Agreement is attached hereto as Exhibit CG-3. As a result of the Arbitrators' Interim Order, Covad began offering limited services in Texas on August 2, 1999.

19. The hearing on the Motions for Sanctions progressed with the merits hearing through June 6, 1999 and reconvened on June 23, 1999. On July 27, 1999, the Arbitrators issued their ruling on the motions for sanctions finding that

- The instruction to destroy evidence from an SBC attorney to 81 employees of SWBT, SBC, and their affiliates is a sanctionable discovery abuse;
- SWBT intentionally misdesignated witnesses so that they could plausibly deny knowledge of key technical information;
- SWBT's uncontroverted failure to produce requested documents before the arbitration hearing is a sanctionable discovery abuse.

A true and correct copy of this Order is attached hereto as Exhibit CG-4. Although SWBT appealed this order, the Texas Commission ultimately ordered SWBT to pay Covad and Rhythms \$850,000 in sanctions.

20. SWBT's discovery abuse delayed the conclusion of the arbitration hearing by over two months. Because of the numerous additional issues raised by SWBT's conduct, and through no fault of their own, the Arbitrators were unable to issue their decision on the merits of the arbitration until November 30, 1999, over eleven months

after Covad had filed its original Petition. A true and correct copy of this Award is attached hereto as Exhibit CG-5.

21. Unsatisfied with the delay it already had caused, SWBT appealed the DSL Arbitration Award on January 6, 2000, claiming, *inter alia*, that the Arbitrators relied on facts not contained in the record. A true and correct copy of SWBT's appeal is attached hereto as Exhibit CG-6. The Arbitrators concluded that SWBT's appeal lacked merit, stating that "SWBT did not cite to a single fact that it believed the Arbitrators relied upon that is not in the record." A true and correct copy of the Arbitrators' memorandum is attached hereto as Exhibit CG-7. On January 27, 2000, the Texas Commission affirmed the Arbitration Award on all significant issues. The Texas Commission is expected to issue its final order on February 7, 2000, constituting a final resolution of the arbitration before the Commission.

22. To allow a competitive carrier to achieve a reasonable speed to market, the Telecommunications Act contemplates the resolution of all outstanding issues between a competitive carrier and an incumbent carrier within nine (9) months of the initiation of negotiations. 47 U.S.C. § 252(a)(4)(c). Because of SWBT's bad-faith negotiation tactics, its wide-ranging discovery abuses, including the destruction of DSL-related evidence, and its frivolous appeal of nearly every ruling issued in the DSL Arbitration, outstanding issues between Covad and SWBT will not be resolved until February 7, 2000, over **twenty (20) months** after Covad initiated negotiations with SWBT and **almost a year longer** than the period contemplated by Congress.

**SWBT's Delay Tactics Prevent an Evaluation
of SWBT's Operational Performance Regarding DSL**

23. As stated above, SWBT's delay tactics prevented Covad from providing DSL services in Texas until August 2, 1999. Although SWBT claims its application relies upon two years of CLEC operational experience in Texas, this statement does not apply to DSL CLECs. Indeed, SWBT's tactics actually prevented DSL CLECs from gaining any significant operational experience in Texas at the time Telcordia conducted its review of SWBT's OSS.

24. Contrary to the assertions of SWBT affiants, SWBT's actions ensured that Covad could not participate in Telcordia's third-party testing of SWBT's OSS for DSL. In particular, the affidavit of Elizabeth Ham states that "[t]he limitation on the number of xDSL test cases [evaluated by Telcordia] was a result of the limited number of qualifying CLECs *and their internal resources, not on the part of SWBT.*" (Aff. of Elizabeth Ham ¶ 280) (emphasis added). This statement is patently false. According to its final report, Telcordia concluded its testing of DSL OSS on July 15, 1999. Because of SWBT's delay tactics described above, Covad was unable to place its first loop order with SWBT in Texas until August 2, 1999. If SWBT had allowed Covad to enter Texas in the nine-month time period contemplated by Congress, Covad would have offered numerous test cases for Telcordia's "evaluation." Accordingly, the lack of test cases evaluated by Telcordia is not Covad's fault (as Ham implies); the lack of test cases is directly attributable to SWBT, because of its stonewalling in negotiations, the sanctionable conduct discovered in the April 1999 arbitration hearing, and SWBT's appeal of the Arbitrator's order to enter into an Interim Interconnection Agreement. Likewise, any conclusions reached by Telcordia regarding DSL are misleading at best.

25. SWBT's statements regarding Acceptance Testing are also misleading. Acceptance Testing requires an ILEC Technician to create a "short" on the loop while a CLEC technician is monitoring the loop. If the short shows full connectivity down the entire loop, the ILEC technician has installed the loop properly. Acceptance Testing benefits both the ILEC and the CLEC by reducing the number of trouble tickets and "truck rolls" required to repair loops that the ILEC technicians have installed improperly. Realizing this benefit, many ILECs, including SWBT's sister company, Pacific Bell, have agreed to implement Acceptance Testing for Covad.

26. Because a DSL line does not carry a dial tone, the correct installation of a DSL loop by an ILEC cannot be determined accurately without Acceptance Testing. Without Acceptance Testing, a CLEC cannot reasonably verify an ILEC's claim that it properly installed the loop. Thus, performance metrics for DSL loop delivery that do not incorporate Acceptance Testing, whether calculated by a CLEC or an ILEC, generally are skewed in favor of the ILEC.

27. SWBT affiant Carol Chapman applauds SWBT for offering "Cooperative Acceptance Testing" for DSL loops, noting praise for a similar program offered by Bell Atlantic. (Chapman Aff. ¶ 62.) Chapman fails to disclose that Covad approached SWBT during the Summer of 1999, before Covad had submitted any loop orders in Texas, with a request to implement Acceptance Testing. SWBT initially resisted this request. Although the parties subsequently resumed discussions, SWBT did not agree to provide Acceptance Testing for all of Covad's loops in Texas until December 16, 1999, in the context of the Texas 271 Investigation. Even after agreeing to implement Acceptance Testing of all loops at some time in the future, SWBT still insists upon charging CLECs

for this process, even though Acceptance Testing actually saves SWBT time and money by reducing truck rolls and trouble tickets.

28. Even though SWBT now finally agreed to provide Acceptance Testing on all of Covad's loops, it will only do so through amendments to interconnection agreements. (Incidentally, SWBT's sister ILEC in California, Pacific Bell, provided Acceptance Testing to Covad absent such a requirement.) This has resulted in the simple fact that Covad (and other CLECs) did not have the legal right to acceptance testing with SWBT at the time SWBT filed its application. The Covad-SWBT Interconnection Agreement—amended to include the results of the Covad/Rhythms Arbitration Award and Acceptance Testing—does not go into effect until February 7, 2000.

29. Because SWBT had not fully implemented Acceptance Testing available at the time SWBT filed this 271 Application, data included in the Application does not generally reflect the results of such testing. As a result, SWBT's delay tactics prevent this Commission from evaluating meaningful data regarding SWBT's xDSL-capable loop performance.

**The Texas Commission's 271 Recommendation
Relies Significantly Upon the Implementation of the DSL Arbitration Award**

30. At page 7 of Attachment A to the Memorandum of Understanding between the Texas Commission and SWBT regarding the Texas 271 Collaborative Project, SWBT agreed to follow the results of the Covad/Rhythms DSL Arbitration relating to the provisioning of xDSL services. A true and correct copy of excerpts of the Memorandum of Understanding is attached hereto as Exhibit CG-8.

31. Similarly, Attachment 25 of the T2A proposed by SWBT states that it shall be conformed to the results of the DSL Arbitration in Texas:

The Parties acknowledge and agree that the terms and conditions set forth in this Attachment shall be subject to the final outcome of the [DSL Arbitration] proceeding pending before the Texas Public Utility Commission ("Commission")

T2A, Attach. 25 ¶ 1.1. A true and correct copy of Attachment 25 of the T2A is attached hereto as Exhibit CG-9.

32. SWBT, however, has indicated its intention to appeal the Covad/Rhythms DSL Arbitration Award in its filings with Texas Commission, and in reservations of rights in the Memorandum of Understanding and the T2A. (*See* Exhibit CG-6; Exhibit CG-8, Attach. B, Section III.D; Exhibit CG-9 ¶ 10.1.) Accordingly, neither this Commission nor the residents of Texas have any assurance that SWBT will honor its commitments to provide non-discriminatory access to unbundled xDSL-capable loops, DSL-related OSS, and other unbundled network elements discussed in the Award.

**SWBT Has Not Shown That All Aspects of Its
Discriminatory Selective Feeder Separation Scheme Have Been Dismantled**

33. As shown by the Supplemental Direct Testimony of Anjali Joshi in the DSL Arbitration, SWBT seeks to employ a discriminatory spectrum management scheme named "Selective Feeder Separation." A true and correct copy of the Supplemental Direct Testimony of Anjali Joshi is attached hereto as Exhibit CG-10. SWBT's SFS scheme discriminates against DSL CLECs in two ways: (1) SFS restricts deployment of CLECs' SDSL services in favor of ADSL services by relying on unfounded technical assumptions; (2) SFS assigns higher quality loops to the type of ADSL services provided by SWBT and relegates competitive SDSL services to lower grade loops. As a result, SWBT's plan would not only severely restrict the deployment of competitive SDSL services, it also would require CLECs to incur more non-recurring costs, such as costs for

loop conditioning, than would be incurred by SWBT or its affiliate. In sum, SWBT reserves the “clean” loops for its type of ADSL service and relegates competitive DSL services to the “dirty” loops.

34. In the Covad/Rhythms Arbitration Award, the Arbitrators determined that SWBT’s SFS scheme “has the effect of discriminating against deployment of xDSL services other than ADSL, especially in relation to the availability of clean copper loops for use by xDSL providers.” (Exhibit CG-5 at 47.) Accordingly, the Arbitrators ordered SWBT to “stop using its proposed spectrum management process, SFS.” *Id.* The FCC recently reached the same conclusion, ordering in the *Third Advanced Wireline Services Order* that SBC dismantle its SFS system by early February.

35. Although SWBT has committed that it will not deny a CLEC’s request to deploy a competitive DSL service because of spectrum management concerns, it has not shown that it has dismantled SFS’s discriminatory loop assignment process. In addition, SWBT has not fixed the xDSL loop ordering process that frequently requires Covad to “supplement” xDSL loop orders. Unless all aspects of SWBT’s discriminatory SFS program are fully and completely dismantled, CLECs will not have nondiscriminatory access to DSL UNEs in Texas.

SWBT and Its Advanced Services Affiliate Refuse to Articulate the Terms of Their Agreement as Required By the SBC-Ameritech Merger Conditions

36. As shown on page 6 of the attached NARUC presentation and other public admissions, SWBT allows its separate affiliate, ASI, to line share, *i.e.*, to provision ADSL over the voice loops presently serving SWBT’s voice customers. A true and correct copy of the ASI NARUC presentation is attached hereto as Exhibit CG-11. In a transparent attempt to flout the SBC-Ameritech Merger Conditions, SWBT and ASI filed

their proposed interconnection agreement with the Texas Commission on October 5, 1999 without articulating their agreement regarding line-sharing.

37. On December 7, 1999, Covad, Rhythms, and NorthPoint Communications filed exceptions to the Texas Commission's proposed order approving the SWBT-ASI Interconnection Agreement, noting that the Merger Conditions require SWBT and ASI to file an agreement that is "sufficiently detailed to permit telecommunications carriers to exercise effectively the 'pick and choose' rights under 47 U.S.C. § 252(i) and the Commission's rules implementing that section." SBC-Ameritech Merger Order, Attachment on Merger Conditions ¶ I.5.a. The position of the Covad, Rhythms, and Northpoint is consistent with this Commission's interpretation of the Merger Conditions, as expressed in the January 12, 2000 letter from Lawrence Strickling, Chief, Common Carrier Bureau, to members of the Kansas Corporation Commission. A true and correct copy of this letter is attached hereto as Exhibit CG-12.

38. SWB-ASI subsequently withdrew its proposed agreement and instead chose to have ASI opt into the T2A. SWBT-ASI's procedural machinations, however, do not relieve it of its obligation to abide by the Merger Conditions. Because the T2A does not contain a statement of the SWBT-ASI agreement regarding line-sharing, SBC has failed to comply with the SBC-Ameritech Merger Conditions. Covad, Rhythms, and NorthPoint raised this issue again in their Motion to Require ASI to Supplement its Agreement with SWBT, filed with the Texas Commission on January 18, 2000. A true and correct copy of this motion is attached hereto as Exhibit CG-13. SWBT-ASI,

however, still refuses to comply with the Merger Conditions, advocating an interpretation of the Conditions that is directly contrary to Mr. Strickling's letter of January 12, 2000. True and correct copies of SWBT's and ASI's opposition to the Motion to Supplement is attached hereto as Exhibit CG-14.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 30, 2000



Christopher V Goodpastor

VIA-FACSIMILE AND E-MAIL

November 16, 1998

Mr. Prince Jenkins
Senior Counsel
Covad Communications, Co.
2330 Central Expressway
Santa Clara, CA 95050

Re: SWBT/Covad Negotiations for Texas Interconnection Agreement

Dear Prince:

This is in response to your November 6, 1998 letter.

In general, Covad essentially requests that SWBT provide to Covad an unbundled, "clean," copper loop over which it can provision any type of Digital Subscriber Line ("DSL") technology, at any time, at any speed, and at any power it may choose. Because of the differences among the DSL technologies and the effects they have on the network in relation to each other, SWBT cannot permit such a "free for all" where Covad and every other carrier would be allowed to place as much power and at whatever frequencies they desire whenever and for as long as they desire. The end result would be harm to the services of all carriers using the network, including Covad's. Covad seeks to deploy advanced services that take advantage of SWBT's prior prudent management of the public switched network, while opportunistically seeking to evade any similar network management with respect to Covad's own services.

Contradiction

SWBT's approach is simple. It would like to know the particular digital service that is actually being placed on SWBT UNE loops, and assurance that the power and frequency being placed on a specific loop do not exceed certain standards for that particular service. In the Advanced Service NPRM, the FCC acknowledged the interference that can be caused between digital services, id. ¶ 160, and asked for comment on how to avoid interference and other harms through "loop spectrum management." Until national standards are developed and adopted, SWBT must act in the best interests of all users of its network by testing technologies, gathering information, then designing UNEs to support them in a manner that preserves the integrity of its network for all. *Industry should take this role.*

In your letter, you allege that SWBT's affiliate, PacBell, does not restrict Covad from using its UNE loops to offer any flavor of DSL it may choose and claims that no other ILEC has imposed such restrictions. What Covad has failed to acknowledge is that its deal with PacBell was struck long before SWBT or PacBell (and presumably other ILECs) had the knowledge they do today with respect to DSL technology. PacBell's California contracts containing ISDN/xDSL loop language were executed prior to the existence of any standards on ADSL (or any other DSL technology), and were the result of a very limited understanding of these new technologies. It

was not clear at the time that ISDN and DSL had different loop design criteria and in fact did not coexist well when placed in the same cables. This lack of knowledge has contributed to a number of the provisioning coordination problems, service disruptions due to facility modernization and interference with services of end users. Conversely, today, the significant effects of interference on neighboring digital services is now commonly acknowledged within the industry. *NO
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Your assertion that PacBell "does not restrict Covad from using its loops to offer xDSL," is not completely true. While the Pacific Bell/Covad Interconnection Agreement includes a loop offering referenced in the agreement as a "2-Wire Digital (ISDN/xDSL Capable) Link," as you know, Pacific Bell and Covad have had to work diligently over many months to put processes in place by which Covad now specifies the type of DSL service it is ordering. Your letter incorrectly implies that Pacific Bell simply provides a loop and that is all that is necessary. As you are well aware, much more detail around ordering procedures, loop and equipment parameters and spectrum management is indeed necessary for Covad to do business in California. In other words, there are necessary practices and procedures which have been put in place between Covad and PacBell in California which are not reflected in the Interconnection Agreement between the parties. In our negotiations for an Interconnection Agreement in Texas, SWBT is attempting to address these issues with Covad now, as opposed to later. *PacBell
imposed
requirements*

Quite frankly, it is apparent from the misrepresentations and inflammatory allegations set forth in your letter, that Covad is much more interested in "posturing" for litigation/arbitration purposes than "negotiating" an Interconnection Agreement with SWBT in Texas. SWBT believes it has made every attempt to accommodate Covad's requests to date and will continue to attempt to work with Covad. In fact, at Covad's request, SWBT agreed to extend the opening of the "arbitration window" from October 10, 1998 to November 26, 1998, to allow the parties additional time to meet and negotiate to attempt to resolve the outstanding issues between our two companies. However, it is difficult for SWBT to satisfy a carrier who has no wish to negotiate. In order to reach what I hope is our common goal - a mutually acceptable Agreement in Texas - we urge both you and your client to commence negotiating with SWBT in good faith to attempt to reach a satisfactory result for both parties. In order to do this, it will be necessary for Covad to "negotiate" rather than "demand," and to begin fulfilling commitments made to SWBT in negotiations.

I believe this letter, along with Attachment "A" hereto, addresses all of the "open" issues identified by Covad in your November 6 letter. I share your disappointment that our clients appear to be headed towards arbitration, rather than negotiation. However, let me assure you that it always has been and will continue to be SWBT's intent and practice to abide by the law, including its obligation to negotiate with other carriers in good faith. We hope that Covad will reevaluate its very apparent, premature decision to arbitrate and/or litigate with SWBT in Texas, and commence negotiating with SWBT in good faith as it is also legally obligated to do. If so, we still may not be able to resolve all of the issues between our clients, but we can certainly make some headway. We look forward to the opportunity.

Yours very truly,

AMY WAGNER

Attachment "A"

1. Proposed 2 Wire ADSL Capable Loop Contract Language

In your letter, you advised that you included in your response Covad's 'mark-up' of "SBC's proposal to restrict Covad's xDSL service offerings, as well as SBC's proposed pricing for xDSL capable loops, loop conditioning and loop qualification." This representation is inaccurate for a number of reasons. First, the language provided to you was Southwestern Bell Telephone Company's ("SWBT") proposal for a 2 Wire ADSL Capable Loop. It was not a proposal by SBC, which could also include PacBell or SNET (and it was not a proposal by either of those entities or any SBC entity other than SWBT), and it was not a proposal relating to xDSL, but rather, was limited to ADSL only. Finally, Covad did not provide SWBT a "mark-up" of SWBT's proposed language with respect to a 2 Wire ADSL Capable Loop in Texas, but rather, deleted all of SWBT's proposed language and proposed its own, contrary to its previous commitment to provide to SWBT a redlined version of SWBT's proposed language. Regardless, in an attempt to further the negotiations process, SWBT has attached hereto proposed alternate contract language for a 2-Wire ADSL Capable Loop, which includes additional language to attempt to address Covad's perceived needs with respect to ADSL. Such language includes accommodations asked for by CLECs, including Covad, and agreed to by SWBT, in connection with the Texas Collaborative Workshops. We urge you to review this language before our negotiations on Tuesday so that it can form the basis for our discussions, at least with respect to ADSL. We can also discuss any questions or concerns you may have at that time. Because SWBT is offering such language as an attempt to resolve Covad's demands in negotiations, SWBT reserves the right to withdraw any or all such language if the parties are unable to reach a negotiated Agreement.

problem
Mark
or
relinquish
redline

Where
is
the proposed
alternate
language?

2. Proposed Contract Language for DS-1 and DS-3 Capable Loops

In your letter, you also requested that SWBT provide two additional UNE loops in Texas; specifically, a DS-1 capable loop and a DS-3 capable loop. SWBT's existing 4 wire digital UNE loop in Texas is a DS-1 capable loop which delivers an ANSI standard T1 signal. Therefore, we believe SWBT's current 4 wire digital loop offering satisfies Covad's request for a DS-1 capable loop.

In requesting a DS-3 capable loop, Covad did not articulate whether Covad is requesting a DS-3 loop between its location and its end-user's location or between its location and a SWBT central office. If Covad is requesting a DS-3 capable loop between its location and a SWBT central office, such a loop would constitute unbundled dedicated transport, which is a UNE that is available to Covad (and is included in the SWBT/AT&T Texas Interconnection Agreement). If Covad is requesting a DS-3 capable loop between its location and its end-user's location, a request for such a loop would need to be submitted to SWBT via the BFR process (which is referred to as the "special request process" in Section 2.22, et seq., Attachment 6 — UNE, of the SWBT/AT&T Texas Interconnection Agreement), since SWBT does not have a general "DS-3 capable loop" offering. Another option would be for Covad to obtain DS-3 transport from SWBT directly out of SWBT's existing Access Tariff, FCC 73. Irrespective of whether Covad requested

a DS-3 capable loop through FCC 73, or the BFR/special request process, for transport between its location and its end-user's location, Covad would be charged the same rate.

3. AT&T/SWBT Texas Interconnection Agreement as Baseline for Negotiations

You also confirmed our previous agreement to use the SWBT/AT&T Texas Interconnection Agreement as the baseline for negotiations between SWBT and Covad for a Texas Interconnection Agreement. You further stated that Covad has requested that the Texas Agreement between Covad and SWBT be used as the core, underlying document for a "multi-state" agreement with other SBC affiliates, in their respective territories. This is the first time Covad has made such a request of SWBT. However, SWBT previously articulated its position on this issue when Covad demanded to use its California Agreement with PacBell as a baseline for negotiations with SWBT in Texas. As we previously advised, SWBT is not amenable to using a Texas Agreement as a baseline for negotiations in any other SWBT state or outside SWBT states in any of its affiliates' territories. In fact, we advised you in our meeting on October 30 that you would need to direct any requests for negotiations with SNET to that entity. And, on November 9, Chad Townes, your SWBT Account Manager, provided you with the following contact name for SNET: Michael Phelan, 530 Preston Avenue, Meridian, Connecticut 06450, and Covad already has an Agreement in place with another SWBT affiliate, PacBell. We believe that we have comprehensively addressed this issue in past correspondence and trust that Covad now understands SWBT's position with respect to this issue.

NO.

What about other states
Tx

4. SWBT's Common Cage Collocation Proposal

Finally, you advised that SWBT has committed to provide Covad with additional details relating to SWBT's "Common Cage Collocation offering." Please note that although SWBT recently made a proposal relating to common cage collocation in connection with the Texas Collaborative Process, it is not an offering which SWBT has generally made available in Texas. However, SWBT verbally provided to you the information relating to such proposal on Friday, November 6, and confirmed such information in writing on the same date, and thus believes it has fully responded to all of Covad's requests. Please let us know if you should have any additional questions relating to such proposal.

is this a new

5. DSL Capable Loops

We are very surprised by your representation that SWBT advised Covad in our October 30, 1998, negotiations that "Covad would not be allowed" to offer any flavor of DSL over SWBT's loops in Texas. This is completely inaccurate. In our negotiations, we advised Covad several times that SWBT is willing to entertain Covad's requests to provide DSL services (in addition to ADSL for which we had a specific proposal) over existing SWBT UNE loops in Texas, but that because no national standards have been developed and SWBT does not currently have an xDSL capable loop available as a general wholesale offering in Texas, SWBT proposed to handle such requests via a "BFR" or "special request" process. I find it remarkable that you would assert otherwise given our lengthy discussion regarding the BFR process with both you and your client/co-

counsel, Dhruv Khanna. If you will recall, Mr. Khanna advised on several occasions that the BFR process was not acceptable to Covad because it intended to provision any DSL flavor of its choice over existing SWBT UNEs in Texas. In fact, you mention SWBT's BFR proposal in a subsequent section of your letter. In any event, as a result of Covad's concerns, SWBT, in a November 5, 1998 letter to Mr. Khanna, offered to evaluate any such requests by Covad (i.e., to provision SDSL or IDSL over existing UNE loops in Texas) in advance of an approved Interconnection Agreement, but indicated that it would need further information from Covad.

In your November 6 letter, Covad elected not to address SWBT's proposal, but rather, to simply misrepresent that SWBT has advised Covad that it "would not be allowed" to offer any flavor of DSL over SBC's loops in Texas and to state that "SBC's position is plainly unlawful and anti-competitive." As noted above, Covad's transparent attempt to posture this case for litigation has not gone unnoticed. However, Covad's recitation of the facts upon which its inflammatory allegations were based was neither complete, nor accurate, and Covad's allegation of improper and/or unlawful conduct on the part of SWBT is completely frivolous.

SWBT has and continues to abide by the law in all respects and has made every attempt to accommodate Covad's repeated "demands." SWBT's position has not changed on this matter, but is the same as was articulated to Covad on October 30 and again on November 5. However, SWBT is willing to evaluate Covad's request to provision SDSL and IDSL over existing UNE loops in Texas in advance of an approved Interconnection Agreement as expressed to Covad in my November 5 letter to Mr. Khanna. However, in order to commence work in this regard, we will need additional information from Covad. Specifically, in our negotiations on October 30, Covad committed to provide SWBT with the following information no later than November 6: (1) the type of DSL technology/service Covad proposes to offer over a SWBT UNE loop; (2) the specific type of SWBT UNE loop in Texas Covad proposes to offer such service over; (3) the power/speed at which Covad proposes to offer such services; and finally, (4) the equipment it intends to use, including but not limited to any and all vendor information it may have with respect to such equipment (i.e., equipment specifications, power requirements and any other relevant characteristics or technical parameters).

Unacceptably
✓

In your letter, you advise that Covad intends to offer a variety of xDSL services in Texas including, but not limited to: ADSL, SDSL and IDSL. As you know, SWBT currently has a 2 Wire ADSL Capable Loop offering in Texas. Therefore, we believe that offering addresses Covad's need with respect to ADSL. However, you have not advised what type of UNE loop in Texas you wish to provision each type of DSL service (other than ADSL) over i.e., 2 wire digital, 4 wire digital, etc. You also indicated that your DSL offerings are "not limited to" the "flavors" itemized above. As we previously discussed and as Covad previously committed to provide, we need for Covad to advise what other types of DSL technologies it intends to use to offer services and over which existing SWBT UNEs in Texas. You further advised that Covad currently offers "44, 192, 384, 768 and 1.1 and 1.5/384 asymmetrical XDSL services" and that "Covad requires a basic "clean" copper loop, i.e., substantially free of load coils, bridged taps, etc. to provision *any speeds above 144 kbps.*" Clearly, such information is not responsive to SWBT's request or with what Covad committed to provide, which was the speed at which it intends to provide each type of DSL service and the type of loop it intends to provision such service over. A minimum speed

unacceptable

is not helpful — it is a maximum speed and Power Spectrum Masks which SWBT needs in order to evaluate Covad's request.

In our October 30 negotiations, both you and Mr. Khanna explicitly agreed to provide the speed Covad intends to provision each type of DSL service at, including the maximum speed of each service, after lengthy discussions following Mr. Khanna's suggestion that we look to Covad's web page to find out the specifics relating to the services Covad offers instead of Covad itself in negotiations. Finally, you advised that Covad currently intends to deploy Diamond Lane and Cisco DSLAMS, but refused to provide SWBT with the equipment specifications based upon your spurious belief that such specifications would change "by the time SWBT permits Covad to install its equipment in Texas." The absence of national standards for DSL technologies other than ADSL, which are not even complete, makes it imperative and reasonable that SWBT be afforded the opportunity to assess your vendor data.

NO -

irrelevant

If Covad intends to pursue these negotiations in good faith, and if Covad wishes for SWBT to review Covad's technologies to see if they are compatible with existing SWBT UNE loop offerings (i.e., non-interfering, same loop requirements and design), SWBT is willing to commence its work in this regard as soon as Covad fulfills its October 30 commitment to provide SWBT with all of the necessary information itemized above. However, we do not wish to go to this effort for Covad if it has no intention of attempting to negotiate and reach a satisfactory solution on these issues with SWBT. We will wait to receive further information from Covad in this regard.

Done ->

6. Spectral Protector Coils

You next alleged that SWBT's proposal to "restrict Covad's equipment to limit the speed and power of Covad's service offerings to those offered by SBC, are anticompetitive, and unlawful." You state that such actions "deny Covad the first mover advantage for xDSL in SBC territory, and delays competition in the Texas xDSL market until SBC itself is ready to offer a competing xDSL product." Once again, your comments were clearly made as a predicate to litigation and not as an attempt to negotiate with respect to this issue. Rather than attempt to discuss your concerns with this proposal with SWBT, or to make proposed modifications to SWBT's language in this regard, you elected to once again "posture" for litigation purposes. However, had you asked, SWBT would have explained that SWBT believes it is necessary, in order to protect the integrity of the network, that Covad (and all other CLECs) agree to use the ADSL loop in a manner consistent with SWBT's technical publications and agree not to exceed specified power levels or other technical parameters. The significant effects of interference on neighboring digital services is now commonly acknowledged within the industry. The resulting industry effort to balance and manage spectrum conflicts within the network make it reasonable that SWBT be able to inventory services and employ non-service affecting controls, at its own cost, to avert serious harm to all users of SWBT's network.

NO
unacceptable
proposal
xDSL

To that end, SWBT proposed language which provided that: "CLEC agrees that SWBT may install a device that will restrict power levels in excess of those set forth in said technical publications and engage in non-intrusive testing of power and spectrum usage." SWBT proposed

this language to ensure that CLECs fulfill their commitments to abide by the power levels they have committed to if and when any such "device" is developed in the future. Assuming Covad is willing to honor its previous representation in negotiations that it would advise SWBT of its power and speed, then SWBT finds it difficult to understand why Covad would object to such a device (also known as a "Spectral Protector Coil"). Covad has certainly failed to establish any relationship between this device and Covad's entry into the Texas market. Clearly, such device, which does not even yet exist, has no delaying effect upon Covad's entry into the market. Rather, Covad's entry (or lack of entry) into the market is clearly attributable to Covad's own decision to prepare for litigation/arbitration as opposed to actively engaging in negotiations. *hookin*

7. Covad's False Allegations Relating to SWBT and PacBell

In your letter, you also make totally false allegations of anti-competitive behavior against SWBT's California affiliate, Pacific Bell ("PacBell"). To date, no court of law has ruled that SBC, or any SBC affiliate, including PacBell or SWBT has engaged in anti-competitive behavior. In fact, the Federal District Court Judge in the pending Covad vs. PacBell lawsuit denied Covad's demand for preliminary injunctive relief. In so ruling, the Court found that Covad had not demonstrated any irreparable harm from the denial of collocation space; that there were workable alternatives to physical collocation; and that Covad had not proved any intentional conduct on PacBell's part, nor did Covad prove any relationship between the lack of space for physical collocation in 1997 and early 1998, and the subsequent, mid-summer 1998 roll-out of PacBell's retail ADSL product. Covad has not proved any such relationship because none exists. Neither PacBell, nor SWBT, have ever acted in an anti-competitive manner towards Covad; in fact, both PacBell and SWBT have been working diligently with Covad for months to meet Covad's perceived needs and expectations. *you have a copy of the App. Court*

Your allegation that "SBC" declared over 50 offices as out of space without making "the requisite demonstration to the CPUC" is not only irrelevant to Covad's negotiations with SWBT in Texas, but is also inaccurate. Contrary to your representations, PacBell did indeed make the requisite "demonstration" in meetings and discussions with the CPUC in late 1997 and early 1998, and has filed floor plans of denied offices with the CPUC as required by the FCC. The CPUC's lack of a process for reviewing denials of offices is not a fault which can be attributed to PacBell. Further, the presence or lack of such procedures has nothing whatsoever to do with whether or not space exists for physical collocation in California. As you know, PacBell has devoted enormous efforts to improve processes and to add resources in order to meet the over 400 percent increase in collocation demand that occurred beginning in late 1997 in California. And, Covad has been a recipient of those tremendous efforts, with DSL equipment collocated in 147 of PacBell's central offices. Many of Covad's cages were provided in 90 days from application approval, 30 days sooner than the tariffed time frame. In addition, many of those cages are in central offices where PacBell went well beyond the requirements to "find" space and "created" space by removing employee lunch rooms and bathrooms, moving administrative functions, and even moving central office functions. PacBell began this process of resurveying central offices and "creating" space for Covad and other CLECs in denied offices long before Covad filed its lawsuit or pursued arbitration. To imply otherwise is simply not true.